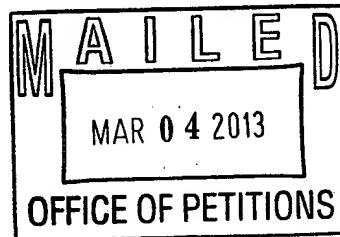




UNITED STATES PATENT AND TRADEMARK OFFICE

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DERGOSITS & NOAH LLP
Three Embarcadero Center
Suite 410
SAN FRANCISCO CA 94111



In re Application of :
Emmelmann :
Application No. 09/449,021 : ON APPLICATION FOR
Filed: November 24, 1999 : PATENT TERM ADJUSTMENT
Atty Docket No. **EMME-1000US0** :

This is in response to the "APPLICATION FOR PATENT TERM ADJUSTMENT UNDER 37 C.F.R. 1.705(b)", filed January 18, 2013. Applicant submits that the patent term adjustment to be indicated on the patent is a minimum of two thousand, three hundred and fifty-seven (2,357) days, not one thousand, one hundred and forty-five (1,145) days as calculated by the Office as of the mailing of the initial determination of patent term adjustment. In addition to timely arguments under 37 CFR 1.705(b), applicant requests that the initial patent term adjustment reflect a calculation under 37 CFR 1.703(b) consistent with the decision of the federal district court holding in *Exelixis, Inc. v. Kappos*, No. 1:12cv-96 (E.D. Va. November 1, 2012).

As the instant application for patent term adjustment requests reconsideration of the patent term adjustment as it relates to the Office's failure to issue the patent within 3 years of the filing date, the application for patent term adjustment under 37 CFR 1.705(b) is **DISMISSED as PREMATURE.**

Knowledge of the actual date the patent issues is required to calculate the amount, if any, of additional patent term patentee is entitled to for Office failure to issue the patent within 3 years. See § 1.702(b). (This is true even where a request for continued examination (RCE) was filed). The computer will not undertake the § 1.702(b) calculation until the actual date of issuance of the patent has been determined. Likewise, the computer will not calculate any further Office delay under § 1.702(a)(4) or applicant delay under § 1.704(c)(10) until the actual date of issuance of the patent has been determined. As

such, the Office can not make a determination on the correctness of the patent term adjustment until the patent has issued.

Requesting reconsideration of the patent term adjustment to be indicated on the patent under 37 CFR 1.705(b) based on the initial determination of patent term adjustment and a projected issuance date of the patent (or even the filing date of the request for continued examination) is premature. Accordingly, it is appropriate to dismiss as premature such a request.

Rather than file an application for patent term adjustment under 37 CFR 1.705(b) contesting the 37 CFR 1.702(b) calculation at the time of the mailing of the notice of allowance, applicant is advised that they may wait until the time of the issuance of the patent and file a request for reconsideration of the patent term adjustment pursuant to 37 CFR 1.705(d). As the USPTO does not calculate the amount of time earned pursuant to 37 CFR 1.702(b) until the time of the issuance of the patent, the Office will consider any request for reconsideration of the patent term adjustment due to an error in the calculation of 37 CFR 1.702(b) to be timely if the request for reconsideration is filed within two months of the issuance of the patent. However, as to all other bases for contesting the initial determination of patent term adjustment received with the notice of allowance, applicant must timely file an application for patent term adjustment prior to the payment of the issue fee¹.

It is noted that any period of adjustment will be entered in light of 35 U.S.C. 154(B) GUARANTEE OF NO MORE THAN 3-YEAR APPLICATION PENDENCY, which provides that:

Subject to the limitations under paragraph (2), if the issue of an original patent is delayed due to the failure of the United States Patent and Trademark Office to issue a

¹ For example, if applicant disputes both the calculation of patent term adjustment under 37 CFR 1.702(a)(1) for Office failure to mail a first Office action or notice of allowance not later than fourteen months after the date on which the application was filed and under 37 CFR 1.702(b) for Office failure to issue a patent within three years of the actual filing date of the application, then applicant must still timely file an application for patent term adjustment prior to the payment of the issue fee to contest the calculation of Office delay in issuing a first Office action or notice of allowance. See 37 CFR 1.705(b) and 35 U.S.C. 154(b)(3)(B). A dispute as to the calculation of the §1.702(a)(1) period raised on request for reconsideration of patent term adjustment under 37 CFR 1.705(d) will be dismissed as untimely filed.

patent within 3 years after the actual filing date of the application in the United States, not including –

- (i) any time consumed by continued examination of the application requested by the applicant under section 132(b);

It is further noted that a Request for Continued Examination (RCE) was filed in this application on December 30, 2008.

To the extent that applicants otherwise requests reconsideration of the patent term adjustment at the time of the mailing of the notice of allowance, the application for patent term adjustment is **GRANTED to the extent indicated herein.**

The Office has updated the PALM and PAIR screens to reflect that the Patent Term Adjustment (PTA) determination at the time of the mailing of the Notice of Allowance is seven hundred and eighty-two days (782) days. A copy of the updated PALM screen, showing the corrected determination, is enclosed.

On October 18, 2012, the Office mailed the Determination of Patent Term Adjustment under 35 U.S.C. 154(b) in the above-identified application. The Notice stated that the patent term adjustment is 1,145 days. On January 18, 2013, applicants submitted the instant petition.

Petitioner asserts that the adjustment to the patent term of 265 days for the mailing of a Miscellaneous Communication on October 5, 2007, is incorrect. Petitioner's argument is well-taken. A review of the application file history did not reveal a reply under 35 U.S.C. 132 or appeal taken under 35 U.S.C. 134 that would have triggered the four month period set forth under 37 CFR 1.702(2) and 37 CFR 1.703(a)(2). **The period of adjustment of 265 days is being removed accordingly.**

Petitioner asserts that the adjustment to the patent term of 613 days should be entered for the mailing of a non-final Office action on September 17, 2008, four months and 613 days after Request for Pre-Appeal Conference and Notice of Appeal was filed on September 13, 2006. A Notice of Allowance was mailed April 15, 2008, for which a period of adjustment of 41 days was entered. The period of adjustment of 41 days is being removed. A period of 458 days is being entered under 37 CFR 1.703(a)(3) which began on the day after the date that is four months after

the reply in compliance with 37 CFR 1.113(c) was filed, January 14, 2007, ending on the date of the mailing of an action under 36 U.S.C. 132, April 15, 2008 . It is noted that petitioner asserts that this period of adjustment should extend to September 17, 2008, the date the non-final Office action was mailed. Petitioner makes this assertion based on the fact that the Notice of Allowance mailed April 15, 2008, was withdrawn. It is undisputed that the Office mailed a Notice of Allowance on April 15, 2008. The subsequent mailing of another Office action under 35 U.S.C. 132 does not alter the date used in calculation of the period of adjustment. Pursuant to 35 U.S.C. 154(b)(1)(A)(ii), applicants are only entitled to day-to-day restoration of term lost as a result of delay created by the Office, after four months from the filing of the reply under 37 CFR 1.111 or appeal taken. The fact that the Office later withdrew the Office action does not negate the fact that the Office took action within the meaning of 37 CFR 1.702(a)(2) on April 15, 2008. Further, the examiner does not have the authority to vacate, rescind, or withdraw an Office action. Unless vacated by the Technology Center Director, for purposes of calculating patent term adjustment, the action originally mailed by the examiner on April 15, 2008, will be used to calculate the amount of Office delay, if any, due to the examination delay pursuant to 37 CFR 1.702(a)(2) and 37 CFR 1.703(a)(3). See Changes to Implement Patent Term Adjustment under Twenty-Year Patent Term; Final Rule, 65 Fed. Reg. 54366 (September 18, 2000). **The period of adjustment of 41 days is being removed. A period of 458 days is being entered under 37 CFR 1.703(a)(3) which began on the day after the date that is four months after the reply in compliance with 37 CFR 1.113(c) was filed, January 14, 2007, ending on the date of the mailing of an action under 36 U.S.C. 132, April 15, 2008 .**

Pursuant to 37 CFR 1.704(c)(8), a period of reduction to the patent term adjustment of 3 days will be entered for the filing of a Notice of Appeal on December 12, 2008, three days after the initial reply was filed on December 9, 2008.

Likewise, pursuant to 37 CFR 1.704(c)(8), a period of reduction to the patent term adjustment of 18 days will be entered for the filing of a Request for Continued Examination on December 30, 2008, three days after the initial reply was filed on December 12, 2008.

Petitioner further maintains that the adjustment to the patent terms of 83 days associated with the mailing of a non-final Office action on July 1, 2009, is incorrect. Petitioner's argument is well-taken. **The period of adjustment under 37 CFR 1.702(a)(2) is corrected to 62 days.**

The period of reduction to the patent term adjustment of 58 days the filing of an Information Disclosure Statement on August 6, 2010, is being removed as the paper was filed during the appeal period.

Pursuant to 37 CFR 1.704(c)(8), a period of reduction of 15 days is being entered for the filing of a supplemental paper on September 27, 2011.

As petitioner asserts, pursuant to 37 CFR 1.702(e), the period of adjustment is 438 days, beginning on the date on which the reply brief was filed December 13, 2010, and ending on the date of the final decision by the Patent Trial and Appeal Board was mailed, February 24, 2012. **The period of adjustment to the "C" delay of 743 is being removed and a period of 438 is being entered.** Petitioner should note that any deductions to the "B" delay for the successful appeal period will be calculated in the revised determination of patent term adjustment at issuance.

It is also noted that the periods of "A" and "C" Office delay overlap between December 13, 2010, through July 12, 2011. **The patent term adjustment will be reduced by an additional 211 days to account for this overlapping period, accordingly.**

The initial patent term adjustment is 782 days with 817 days of Office "A" delay (19 +2 + 458 + 62 + 276) + 438 days of "C" delay - 262 days of Applicant delay (64 + 94 + 66 + 2 + 3+ 18 +15) - 211 days of overlap between the "A" and "C" delay.

The Office acknowledges submission of the \$200.00 fee set forth in 37 CFR 1.18(e) for consideration of the application for patent term adjustment under 37 CFR 1.705(b).

Any request for reconsideration of the patent term adjustment indicated on the patent must be timely filed within 2 months after issuance pursuant to 37 CFR 1.705(d) and must include payment of the required fee under 37 CFR 1.18(e).

The Office of Data Management has been advised of this decision. This application is being referred to the Office of Data Management for issuance of the patent.

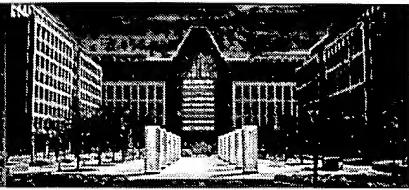
Telephone inquiries specific to this decision should be directed to the undersigned at (571) 272-3222.

/Kenya A. McLaughlin/

Kenya A. McLaughlin
Petitions Attorney
Office of Petitions



**Patent
Term
Adjustments**



PTA/PTE Information

Patent Term Adjustment

Patent Term Extension

Application Number*: 09449021

Search

Explanation of PTA Calculation

Explanation of PTE Calculation

PTA Calculations for Application: 09449021

Application Filing Date	11/24/1999	Overlapping Days Between (A and B) or (A and C)	0
Issue Date of Patent		Non-Overlapping USPTO Delays	1429
A Delays	686	PTO Manual Adjustment	-363
B Delays	0	Applicant Delay (APPL)	284
C Delays	743	Total PTA (days)	782

* - Sorted Column

File Contents History

Action Number	Action Recorded Date	Action Due Date	Action Code	Action Description	Duration PTO	Duration APPL	Parent Action Number
271	02/26/2013		P028	Adjustment of PTA Calculation by PTO		389	0
270	02/26/2013		P028	Adjustment of PTA Calculation by PTO	26	0	
256	10/18/2012		MN/=.	Mail Notice of Allowance		0	
255	10/17/2012		OAR	Office Action Review		0	
254	10/17/2012		OAR	Office Action Review		0	
253	10/08/2012		OAR	Office Action Review		0	
252	10/08/2012		OAR	Office Action Review		0	
251	09/28/2012		OAR	Office Action Review		0	
250	09/28/2012		OAR	Office Action Review		0	
249	09/28/2012		IREV	Issue Revision Completed		0	
248	09/28/2012		DVER	Document Verification		0	
247	09/28/2012		N/=.	Notice of Allowance Data Verification Completed		0	
246	09/27/2012		EX.R	Reasons for Allowance		0	
245	09/27/2012		CNTA	Allowability Notice		0	
242	09/20/2012		FWDX	Date Forwarded to Examiner		0	
239	09/20/2012		ABN9	Disposal for a RCE / CPA / R129		0	
241	09/17/2012		AMSB	Amendment Submitted/Entered with Filing of CPA/RCE		0	
240	09/17/2012		RCEX	Request for Continued Examination (RCE)		0	
238	09/17/2012		BRCE	Workflow - Request for RCE - Begin		0	
237	09/07/2012		FIDC	Finished Initial Data Capture		0	
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235	08/23/2012		TCPB	Printer Rush- No mailing		0	
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233	08/23/2012		TCPB	Printer Rush- No mailing		0	
232	07/25/2012		PUBTC	Pubs Case Remand to TC		0	
231	06/19/2012		EIDC	Export to Initial Data Capture		0	
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229	06/13/2012		OAR	Office Action Review		0	
228	06/13/2012		OAR	Office Action Review		0	
226	06/11/2012		OAR	Office Action Review		0	
223	05/30/2012		OAR	Office Action Review		0	
227	05/23/2012		IDSC	Information Disclosure Statement considered		0	
225	05/23/2012		RCAP	Reference capture on IDS		0	
224	05/23/2012		M844	Information Disclosure Statement (IDS) Filed		0	
222	05/23/2012		WIDS	Information Disclosure Statement (IDS) Filed		0	
221	05/23/2012		OAR	Office Action Review		0	
220	05/23/2012		N/=.	Notice of Allowance Data Verification Completed		0	
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209	04/04/2012		M327-E	BOA miscellaneous communication to applicant		0	
208	02/24/2012	02/12/2010	MAPDR	Mail BPAI Decision on Appeal - Reversed	743	143	
207	02/24/2012		APDR	BPAI Decision - Examiner Reversed		0	
206	01/26/2012		APCH	Confirmation of Hearing by Appellant		0	
205	01/19/2012		APNH	Notification of Appeal Hearing		0	
204	11/22/2011		MPTDE	Mail-Petition Decision - Denied		0	
203	11/21/2011		PTDE	Petition Decision - Denied		0	
201	11/17/2011		AP_DK_M	Docketing Notice Mailed to Appellant		0	
200	11/17/2011		APAS	Assignment of Appeal Number		0	
199	11/14/2011		MRBNE	Mail Reply Brief Noted by Examiner		0	
198	11/14/2011		APWD	Appeal Awaiting BPAI Docketing		0	
197	11/10/2011		OAR	Office Action Review		0	
196	11/09/2011		RBNE	Reply Brief Noted by Examiner		0	
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186	09/15/2011	FWDX	Date Forwarded to Examiner	0
189	09/13/2011	PET.	Petition Entered	0
185	09/12/2011	APRB	Reply Brief Filed	0
184	07/28/2011	PACC	Exam. Ans. Review Complete	0
183	07/12/2011	10/09/2010 MAPE2		Mail Supplemental Examiner's Answer <u>276</u> 150
182	07/08/2011	APE2	2nd or Subsequent Examiner's Answer to Appeal Brief	0
181	04/18/2011	IDSC	Information Disclosure Statement considered	0
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175	04/18/2011	WIDS	Information Disclosure Statement (IDS) Filed	0
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176	04/15/2011	M844	Information Disclosure Statement (IDS) Filed	0
174	04/15/2011	WIDS	Information Disclosure Statement (IDS) Filed	0
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173	04/12/2011	RCAP	Reference capture on IDS	0
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171	04/12/2011	WIDS	Information Disclosure Statement (IDS) Filed	0
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165	02/16/2011	TCWD	Appeal ready for BPAI docketing	0
162	12/17/2010	PA..	Change in Power of Attorney (May Include Associate POA)	0
161	12/16/2010	CAD	Correspondence Address Change	0
167	12/13/2010	APRB	Reply Brief Filed	0
166	12/13/2010	APOH	Request for Oral Hearing	0
160	10/25/2010	TCRD	Return of Undocketed appeal to the TC	0
159	10/25/2010	PACC	Exam. Ans. Review Complete	0
158	10/13/2010	MAPEA	Mail Examiner's Answer	0
157	10/12/2010	APEA	Examiner's Answer to Appeal Brief	0
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155	09/22/2010	EXIN	Examiner Interview Summary Record (PTOL - 413)	0
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154	08/06/2010	06/09/2010 M844		Information Disclosure Statement (IDS) Filed <u>58</u> 150
153	08/06/2010	WIDS	Information Disclosure Statement (IDS) Filed	0
152	08/06/2010	WIDS	Information Disclosure Statement (IDS) Filed	0
151	06/16/2010	FWDX	Date Forwarded to Examiner	0
149	06/15/2010	APBR	Appeal Brief Review Complete	0
150	06/09/2010	AP.B	Appeal Brief Filed	0
148	05/17/2010	APBD	Notice -- Defective Appeal Brief	0
147	05/14/2010	FWDX	Date Forwarded to Examiner	0
145	05/14/2010	APBR	Appeal Brief Review Complete	0
146.1	05/12/2010	APBI	Defective / Incomplete Appeal Brief Filed	0
146	05/12/2010	AP.B	Appeal Brief Filed	0
144	05/12/2010	XT/G	Request for Extension of Time - Granted	0
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137	10/01/2009	A...	Response after Non-Final Action	0
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192	06/30/2009	PTGR	Petition Decision - Granted	0
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128	01/06/2009	FWDX	Date Forwarded to Examiner	0
126	01/06/2009	ABN9	Disposal for a RCE / CPA / R129	0
129	12/30/2008	AMSB	Amendment Submitted/Entered with Filing of CPA/RCE	0
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131	10/17/2008	IDSC	Information Disclosure Statement considered	0
119	10/17/2008	RCAP	Reference capture on IDS	0
118	10/17/2008	M844	Information Disclosure Statement (IDS) Filed	0
117	10/17/2008	WIDS	Information Disclosure Statement (IDS) Filed	0
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109	05/19/2008	QURI	Workflow - Query Request - Begin	0
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106	04/15/2008	MEX.A	Mail Examiner's Amendment	0
104	02/26/2008	IREV	Issue Revision Completed	0
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99	02/20/2008	DVER	Document Verification	0
98	02/20/2008	N=.	Notice of Allowance Data Verification Completed	0
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96	02/19/2008	EX.A	Examiner's Amendment Communication	0

95	02/19/2008	CNTA	Allowability Notice	0
105	01/30/2008	LET.	Miscellaneous Incoming Letter	0
94	01/24/2008	EXIN	Examiner Interview Summary Record (PTOL - 413)	0
93	11/09/2007	FWDX	Date Forwarded to Examiner	0
92	11/05/2007	A...	Response after Non-Final Action	0
91	10/05/2007	01/13/2007 MCTMS	Mail Miscellaneous Communication to Applicant	<u>265</u> 71
90	10/01/2007	CTMS	Miscellaneous Action with SSP	0
87	07/31/2007	LET.	Miscellaneous Incoming Letter	0
86	07/20/2007	LET.	Miscellaneous Incoming Letter	0
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83	07/02/2007	FWDX	Date Forwarded to Examiner	0
82	07/02/2007	MAPCR	Mail Appeals conf. Reopen Prosec.	0
81	07/02/2007	MEXIN	Mail Examiner Interview Summary (PTOL - 413)	0
84	06/28/2007	EXIN	Examiner Interview Summary Record (PTOL - 413)	0
80	06/25/2007	EXIN	Examiner Interview Summary Record (PTOL - 413)	0
79	06/25/2007	APCR	Pre-Appeals Conference Decision - Reopen Prosecution	0
78	06/07/2007	LET.	Miscellaneous Incoming Letter	0
76	05/07/2007	MEXIN	Mail Examiner Interview Summary (PTOL - 413)	0
74	01/08/2007	C.AD	Correspondence Address Change	0
73	01/08/2007	C.AD	Correspondence Address Change	0
72	01/08/2007	PA..	Change in Power of Attorney (May Include Associate POA)	0
77	09/13/2006	AP.C	Request for Pre-Appeal Conference Filed	0
71	09/13/2006	N/AP	Notice of Appeal Filed	0
70	06/15/2006	MEXIN	Mail Examiner Interview Summary (PTOL - 413)	0
69	06/15/2006	06/13/2006 MCTNF	Mail Non-Final Rejection	<u>2</u> 61
68	06/12/2006	CTNF	Non-Final Rejection	0
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62	02/16/2006	FWDX	Date Forwarded to Examiner	0
61	02/13/2006	AP.B	Appeal Brief Filed	0
60	02/13/2006	XT/G	Request for Extension of Time - Granted	0
59	11/30/2005	MCTAV	Mail Advisory Action (PTOL - 303)	0
58	11/28/2005	CTAV	Advisory Action (PTOL-303)	0
57	09/08/2005	09/06/2005 N/AP	Notice of Appeal Filed	<u>2</u> 52
56	08/18/2005	FWDX	Date Forwarded to Examiner	0
54	08/18/2005	C.AD	Correspondence Address Change	0
53	08/18/2005	PA..	Change in Power of Attorney (May Include Associate POA)	0
55	08/10/2005	A.NE	Amendment after Final Rejection	0
52	06/06/2005	05/18/2005 MCTFR	Mail Final Rejection (PTOL - 326)	<u>19</u> 47
51	05/31/2005	CTFR	Final Rejection	0
50	03/22/2005	DOCK	Case Docketed to Examiner in GAU	0
49	03/12/2005	TSSCOMP	IFW TSS Processing by Tech Center Complete	0
48	03/12/2005	FWDX	Date Forwarded to Examiner	0
47	01/18/2005	11/13/2004 A...	Response after Non-Final Action	<u>66</u> 42
46	01/18/2005	XT/G	Request for Extension of Time - Granted	0
43	01/18/2005	WAMD	Workflow incoming amendment IFW	0
42	08/13/2004	MCTNF	Mail Non-Final Rejection	0
41	08/09/2004	CTNF	Non-Final Rejection	0
39	05/28/2004	FWDX	Date Forwarded to Examiner	0
44	04/30/2004	AF/D	Affidavit(s) (Rule 131 or 132) or Exhibit(s) Received	0
40	04/30/2004	C602	Oath or Declaration Filed (Including Supplemental)	0
38	04/30/2004	01/27/2004 A...	Response after Non-Final Action	<u>94</u> 35
37	04/30/2004	XT/G	Request for Extension of Time - Granted	0
36	04/30/2004	WAMD	Workflow incoming amendment IFW	0
35	10/27/2003	MCTNF	Mail Non-Final Rejection	0
34	10/20/2003	CTNF	Non-Final Rejection	0
33	08/12/2003	FWDX	Date Forwarded to Examiner	0
32	07/31/2003	05/28/2003 A...	Response after Non-Final Action	<u>64</u> 28
31	07/31/2003	XT/G	Request for Extension of Time - Granted	0
29	06/12/2003	LET.	Miscellaneous Incoming Letter	0
28	02/28/2003	MCTNF	Mail Non-Final Rejection	0
27	02/24/2003	CTNF	Non-Final Rejection	0
26	02/10/2003	MEXIN	Mail Examiner Interview Summary (PTOL - 413)	0
25	02/06/2003	EXIN	Examiner Interview Summary Record (PTOL - 413)	0
23	11/27/2002	FWDX	Date Forwarded to Examiner	0
21	11/27/2002	FWDX	Date Forwarded to Examiner	0
19	11/27/2002	ABN9	Disposal for a RCE / CPA / R129	0
24.7	11/19/2002	M844	Information Disclosure Statement (IDS) Filed	0
24	11/19/2002	WIDS	Information Disclosure Statement (IDS) Filed	0
22	11/19/2002	AMSB	Amendment Submitted/ Entered with Filing of CPA/RCE	0
20	11/19/2002	ACPA	Continuing Prosecution Application - Continuation (ACPA)	0
18	11/19/2002	XT/G	Request for Extension of Time - Granted	0
17	11/19/2002	BCPA	Workflow - Request for CPA - Begin	0

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